No. 1198

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946.

WEST KENTUCKY COAL COMPANY

versus

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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The petitioner, West Kentucky Coal Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the above case.

OPINION BELOW.

The opinion of the Court below is reported in National Labor Relations Board v. West Kentucky Coal Company, No. 9936, 152 F. (2d) 198.

JURISDICTION.

This is an application for review of the final decree of the United States Circuit Court of Appeals for the Sixth Circuit on a petition for enforcement of an order of the National Labor Relations Board as authorized by Section 160, Title 29, U. S. C. A., same being Section 10 (e) of the National Labor Relations Act, and Section 347, Title 28, U. S. C. A.

QUESTIONS PRESENTED.

The questions presented grow out of emergency seizure of coal mines in a national crisis. Further similar emergency action is inevitable. The questions, which are novel, will arise again. Since the Government sooner or later will again find it necessary to break a coal famine which threatens to destroy all industrial progress toward reconversion or which may precipitate another economic disaster, the questions are of such immediate importance as to require consideration by this Court.

They are novel in that they grow out of the procedure and orders of the National Labor Relations Board in a situation in which the President of the United States, acting through the Secretary of the Interior, was the employer or operator, against whom the Board was acting in the interest of the United Mine Workers of America in the crisis created by a cessation of coal production in time of war.

1. This petitioner contended that all of its production and maintenance employees in all of the six (6) coal mines then being operated by it in three (3) counties in Western Kentucky, should be included in an appropriate unit for collective bargaining. The union, though it had agreed to the above prior to elections held in 1941 as to mines then in operation, contended that each of four (4) mines should be separate units.

November 5, 1943, within a few hours after petitioner received official notice that the President of the United States through the Secretary of the Interior, had taken charge of the operation of petitioner's coal mines, an Examiner of the National Labor Relations Board, over the protest of the petitioner, conducted a hearing on petitions of the United Mine Workers of America for investigation and certification of representatives. The question was and is presented as to whether the Secretary of the Interior was a necessary and indispensable party to that proceeding. This petitioner contended that because of the war situation, the crisis in the coal industry and the action of the Commander-in-Chief of our armed forces in taking charge of these operations in time of war, the Secretary of the Interior was an indispensable party. This position was disallowed by the Board and the Court below.

2. Because of the emphatic statements in an Executive Order by the Commander-in-Chief, the importance of the production of coal and the vigorous and effective action of the United Mine Workers of America, the real party in interest, against the inter-

ests of the Government in a time of war, it was and is contended that this was an adversary proceeding. The National Labor Relations Board and the Court held, in substance, that it was a preliminary and non-adversary proceeding.

3. At the first hearing on November 5, 1943, this petitioner appeared specially and introduced no evidence. At a hearing on an unfair labor practice charge in April, 1944, following an *ex parte* election conducted by the National Labor Relations Board, this petitioner attempted to introduce evidence as to what constituted an appropriate unit among its production and maintenance employees.

It contended:

(a) That its failure to introduce evidence at the first hearing was proper and in good faith, and

(b) That the evidence was material and that the National Labor Relations Board should have received it in order to reach a correct conclusion. The Board held that by reason of its failure to present evidence at the hearing on November 15, 1943, this petitioner was estopped to introduce it later. This petitioner contends that a technical rule of estoppel has no place in an allegedly non-adversary proceeding. Its position was disallowed by the National Labor Relations Board and the Court below.

4. This petitioner contends that the bargaining units were fixed by the National Labor Relations Board arbitrarily and capriciously without the benefit of material evidence which it declined to hear, in disregard

of the facts and of the interests of the employees involved; that this would result and has resulted in a Balkanization of the company's operations, making it impossible for it to operate without violating the National Labor Relations Act.

This petitioner was conducting an integrated coal mining operation with a central executive and administrative staff. It was operating several mines, frequently closing old mines and opening new mechanized mines and transferring men as such changes were made. In such an operation any unit which included less than all of the production and maintenance employees of this petitioner would be obviously inappropriate. As a result of the ruling of the National Labor Relations Board on the unit question, one mine in one unit has voted for the union; one mine in another unit has voted against the union and new mines since opened are not in either or any bargaining unit. The question as to what constitutes an appropriate unit is important in view of similar questions incident to the return of veterans and changes in all types of operations of all types of enterprises incident to reconversion.

5. The Examiner for the National Labor Relations Board expressly reserved the right of the Board to reopen the case. This petitioner had no power to reopen the case under rules of the National Labor Relations Board or otherwise. The question is presented as to whether the Court below erred in finding that this petitioner should have made application to reopen the case before the National Labor Relations Board after possession of its mines was restored to it.

6. The question is presented as to whether the National Labor Relations Board should be required to consider available evidence on the question of what constitutes an appropriate unit for collective bargaining or whether on the other hand it can invoke a technical estoppel, thus excluding evidence in a proceeding designated under the Act as an investigation which should be preliminary and impartial.

STATUTES INVOLVED.

The statutes involved are referred to in the above paragraph on "Jurisdiction."

Authorities are cited in the supporting brief, filed herewith.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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